STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

No. D-728-CV-2012-008
Judge: Reynolds

AUGUSTIN PLAINS RANCH, LLC,
Applicant/Appellant,

vs.

SCOTT A. VERHINES, P.E.,
New Mexico State Engineer/Appellee,

and

KOKOPELLI RANCH, LLC, *et al.*,
Protestants/Appellees.

MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on a motion for summary judgment filed by Protestants against Augustin Plains Ranch, LLC ("Applicant"). Pursuant to *Lion's Gate Water v. D'Antonio*, 2009-NMSC-57, ¶ 23, 147 N.M. 523, 226 P.3d 622, "a district court is limited to a de novo review of the issue before the State Engineer." *See* N.M. Const. art. XVI, § 5. The sole issue on appeal is whether the State Engineer was justified in denying Applicant's application for an underground water permit, without holding an evidentiary hearing.

I. STANDARD OF REVIEW

Under Rule 1-056, NMRA, "[s]ummary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may

properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (citations omitted).

II. MATERIAL FACTS

The only facts under consideration in this appeal are two documents: Applicant's amended application (Exhibit "C" to Protestants' Memorandum in Support of Motion for Summary Judgment), and an e-mail modification of the amended application (Exhibit "D" to Protestants' Memorandum in Support of Motion for Summary Judgment), because Applicant argues that the amended application, as modified, supersedes the original application filed on October 12, 2007 (Exhibit "B" to Protestants' Memorandum in Support of Motion for Summary Judgment). It may reasonably be inferred that an amended application supplants an original application; therefore, the original application will not be analyzed.

If the amended application, as modified, violates New Mexico law, the motion should be granted, and the State Engineer's decision should be affirmed. Otherwise, the motion should be denied with a remand to the State Engineer to hold an evidentiary hearing on the application.

A. The Amended Application

On May 5, 2008, Applicant filed with the Office of State Engineer ("OSE") an Amended Application for Permit to Appropriate Underground Water, replacing an earlier application submitted to the OSE on October 12, 2007, collectively identified as Application RG-89943, to divert and use waters from the San Agustin Basin in Catron County, New Mexico. Paragraph 1 of the amended application, on an OSE application

form, asks for the applicant's name, contact information and address, which Applicant answered.

Paragraph 2 is entitled "Location of Wells." Applicant typed, "See Attachment A for description and location of proposed wells." Attachment A details locations of 37 proposed wells on Applicant's ranch in Catron County, New Mexico.

For Paragraph 3, "Well Information," Applicant typed, "See Attachment A," which lists the top depth of the wells (3000 feet), the casing diameter (20 inches), and the expected yield of each well (2000 gallons per minute). For the name of the well driller and driller license number, Applicant typed, "Not yet determined."

Paragraph 4 is entitled, "Quantity," for which Applicant typed "54,000" acre-feet per annum for both consumptive use and diversion amount.

Paragraph 5, "Purpose of Use," lists various purposes with blanks following each purpose: domestic, livestock, irrigation, municipal, industrial, commercial and "other (specify)." Applicant checked each blank and added other purposes of use in the line following "other": environmental, recreational, subdivision and related; replacement and augmentation. Applicant left blank Paragraph 5's last line, "Specific use: _____ _____."

On the first line below Paragraph 6's heading, "Place of Use," Applicant typed, "See Attachment B for place of use description," and left blank the spaces in the following lines:

_____acres of land described as follows:

Subdivision of Section (District or Hydrographic Survey)	Section (Map No.)	Township (Tract No.)	Range	Acres

Attachment B, "Places of Use," states that "the proposed places of use are: A. Within the exterior boundaries of Augustin Plains Ranch ("Ranch"), which is located in Catron County, New Mexico. The location of the Ranch is depicted on the attached boundary map as Exhibit 1 and further described as follows . . . ." Attachment B then provides a page and a half of legal description for the ranch. Following that legal description, Attachment B states other proposed places of use:

> B. Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

A question at the bottom of Paragraph 6 asks, "Who is the owner of the land?" Applicant answered, "Augustin Plains Ranch, LLC."

The final paragraph of the OSE form, Paragraph 7, is entitled, "Additional Statements or Explanations," with blank lines provided for an applicant to complete. Applicant wrote:

> This Amended Application is an amendment of Application No. RG-89943 filed October 12, 2007. The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply in the Rio Grande Basin in New Mexico. Any impairment of existing rights, in the Gila-San Francisco Basin, the Rio Grande Basin, or any other basin, that would be caused by the pumping applied for, will be offset or replaced.

The statements in the completed form were then acknowledged as being true to the best of the knowledge and belief of the signatory, a legal representative of Applicant.

B. Modification to the Amended Application

On June 26, 2008, an attorney for Applicant sent to the OSE an e-mail, with a heading of "Modified Application" and with a subject line of "Augustin Plains Ranch Application – Irrigated Acreage on the Ranch." The substance of the e-mail reads as follows:

> Please accept the following as a modification of the Augustin Plains Ranch, LLC Amended Application for Permit to Appropriate Underground Water, filed May 5, 2008. With regard to the purpose and place of use, to the extent that the applied-for water will be used for irrigation on Augustin Ranch, the irrigation will be limited to 120 acres in each of the following quarter sections: [Thereafter follows a description of 37 quarter sections] . . . .
> More specifically, to the extent that the applied-for water will be used for irrigation on Augustin Ranch, the irrigation will be limited to 120 acres within a 1,290 foot radius of each of the 37 well locations listed on Attachment A to the Amended Application. The total acreage to be irrigated on the Ranch will be 4440 acres.

Modified Application (Exhibit D to Protestants' Memorandum in Support of Motion for Summary Judgment).

III. DISCUSSION

The right to use water in New Mexico is based upon the New Mexico Constitution, which expresses the water law of prior appropriation existing at the constitution's adoption a century ago: "Although '[t]he water in the public stream belongs to the public,' Snow v. Abalos, 18 N.M. 681, 693, 140 P. 1044, 1048 (1914), unappropriated water is 'subject to appropriation for beneficial use.' N.M. Const. art. XVI, § 2. Once appropriated, '[p]riority of appropriation shall give the better right.' N.M. Const. art. XVI, § 2." *State v. City of Las Vegas,* 2004-NMSC-009, ¶ 28, 135 N.M. 375, 89 P.3d 47.

Applicant seeks to establish a water right, "a process that takes a period of time." *Hanson v. Turney*, 2004-NMCA-069, ¶ 8, 136 N.M. 1, 94 P.3d 1, citing *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 473, 362 P.2d 998, 1002-03 (1961) (accepting that it may require years to commence an appropriation, drill a well, install equipment, and dig ditches, all as prerequisite to applying the water to a beneficial use), and *Millheiser v. Long*, 10 N.M. 99, 106-07, 61 P. 111, 114 (1900) (noting that the building of ditches, flumes, and other works are necessary to divert water and apply it to beneficial use).

A. Statutory Procedure for Obtaining a Groundwater Permit

Under New Mexico law, there is a statutory procedure for establishing the right to use water, beginning with obtaining a water permit for surface water pursuant to Chapter 72, Article 5, NMSA 1978, and for underground water pursuant to Chapter 72, Article 12, NMSA 1978. As stated in *Hanson v. Turney,* "A water permit is an inchoate right, and 'is the necessary first step' in obtaining a water right. See Green River Dev. Co. v. FMC Corp., 660 P.2d 339, 348-51 (Wyo. 1983). It is 'the authority to pursue a water right, a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired.' Id. at 348." *Hanson v. Turney,* 2004-NMCA-069, ¶ 9.

After declaring that underground waters with reasonably ascertainable boundaries belong to the public and are available for beneficial use, which is the basis, the measure and the limit of the right to use underground waters (NMSA 1978, §§ 72-12-1, 2), the Legislature prescribes the method for obtaining an underground water permit in NMSA 1978, § 72-12-3 (2001). Subsection A of Section 72-12-3 requires applicants seeking to

appropriate underground water for beneficial use to designate the following in their applications:

(1) the particular underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated;

(2) the beneficial use to which the water will be applied;

(3) the location of the proposed well;

(4) the name of the owner of the land on which the well will be located;

(5) the amount of water applied for;

(6) the place of the use for which the water is desired; and

(7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land.

NMSA 1978, § 72-12-3(A) (2001).

No application can be accepted by the State Engineer unless all of the information required by Subsection A accompanies the application. Section 72-12-3(C). Upon the filing of an application, the State Engineer causes notice of the application to be published for three consecutive weeks in newspapers in the county where the well will be located and in each county where the water will be placed to beneficial use. Section 72-12-3(D). Objections may be filed within ten days of the last notice. *Id.* Subsection D then limits the persons who may object to the application:

> Any person, firm or corporation or other entity objecting that the granting of the application will impair the objector's water right shall have standing to file objections or protests. Any person, firm or corporation or other entity objecting that the granting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protests; provided, however, that the state of New Mexico or any of its branches, agencies, departments,

> boards, instrumentalities or institutions, and all political subdivisions of the state and their agencies, instrumentalities and institutions shall have standing to file objections or protests.

NMSA 1978, § 72-12-3(D) (2001).

If no objections or protests are filed, the State Engineer is required "to grant the application and issue a permit to the applicant to appropriate all or a part of the waters applied for, subject to the rights of all prior appropriators from the source," if he finds that there are unappropriated waters or if the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state. Section 72-12-3(E).

The State Engineer has two options for applications that are opposed or if he is of the opinion that the permit should not be issued. "He may deny the application without a hearing or, before he acts on the application, may order that a hearing be held." Section 72-12-3(F).

If the State Engineer decides to grant an application, then the water user has "a reasonable time after an initial appropriation to put water to beneficial use, known as the doctrine of relation. State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 470-71, 362 P.2d 998, 1001 (1961); Hagerman Irrigation Co., 16 N.M. at 180, 113 P. at 824-25. 'If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated.' Hagerman Irrigation Co., 16 N.M. at 180, 113 P. at 825." *State v. City of Las Vegas,* 2004-NMSC-009, ¶ 35, 135 N.M. 375, 89 P.3d 47. Thus, if the application in this case had been approved by the State Engineer, upon the actual appropriation of water to beneficial use, Applicant's priority date would have been the date of his original application.

B. State Engineer's Decision

After accepting Applicant's original and amended application, as modified, the State Engineer published notices in a number of counties. Over 900 protests were filed. An OSE hearing examiner considered motions to dismiss and held a hearing on those motions. *See* Scheduling Order (Exhibit "E" to Protestants' Memorandum in Support of Motion for Summary Judgment). He then entered an "Order Denying Application," approved by the State Engineer on March 20, 2012 (Exhibit "A" to Protestants' Memorandum in Support of Motion for Summary Judgment).

The hearing examiner's findings and recommendations comprise 26 paragraphs. The first four deal with the State Engineer's jurisdiction, the relief sought and the lack of a need for separate hearings on the various motions to dismiss. Paragraph 5 points to several of the requirements in Section 72-12-3(A) relevant to the hearing officer's decision: "In the application, the applicant **shall** designate: . . (2) the beneficial use to which the water will be applied; and . . . (6) the place of use for which the water is desired; and . . . (7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land." (emphasis added by the hearing examiner)

After citing the State Engineer's statutory authority to deny a permit without a hearing (Paragraphs 6-7), in Paragraph 8 the hearing examiner finds the amended application to be facially invalid vis-à-vis the place of use and the beneficial use to which the water will be applied:

> The face of the subject amended Application requests almost all possible uses of water, both at the Ranch location and at various unnamed locations within "Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin. . . ," but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed

> appropriation would impair existing rights or would not be contrary to the conservation of water in the state or would not be detrimental to the public welfare of the state.

Order Denying Application, ¶ 8.

While finding later in his decision that it is unclear whether irrigation is contemplated only on the Ranch (Paragraph 20), in Paragraphs 9-10, the hearing examiner discusses the amount of water proposed to be used for irrigation, assuming it is all to be used on the Ranch. By dividing the 54,000 acre-feet of water per acre per year (afy) requested by Applicant by the number of acres to be irrigated on the Ranch (4,440), the hearing officer finds that the application calls for a crop irrigation requirement (CIR) of 12.16 afy, much more than the three afy usually recognized by the State Engineer in his administrative practice. Therefore, applying 12.16 afy "to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy." Order Denying Application, ¶ 11.

Paragraphs 12 and 13 quote statements in the original application regarding potential uses for compact deliveries and for supporting municipalities. The hearing examiner notes that neither the Interstate Stream Commission, the only entity authorized to administer compact deliveries to the State of Texas, nor any municipality is a co-applicant. Order Denying Application, ¶¶ 13-16.

Stating that "an application is, by its nature, a request for final action," and that "[i]t is reasonable to expect that, upon filing an application, the Applicant is ready, willing and able to proceed to put water to beneficial use," the hearing examiner finds that "[t]he statements on the face of the subject Application make it reasonably doubtful that the Applicant is ready, willing and able to proceed to put water to beneficial use."

Order Denying Application, ¶¶ 17-19. The hearing examiner concludes it would be against sound public policy to consider an application that lacks specificity of purpose of the use of water, the actual end-user, specific identification of delivery points or methods of delivery. Order Denying Application, ¶¶ 21-22.

In its closing paragraphs, the Order Denying Application determines that the application is so vague and overbroad that it cannot be reasonably evaluated, contrary to public policy, that the application should not be considered, pursuant to NMSA 1978, § 72-5-7 (1985), that the application should be dismissed without prejudice to filing of subsequent applications, and that the hearing should be dismissed. Order Denying Application, ¶¶ 22-26.

IV. ANALYSIS

A. The State Engineer was required to deny the application if it violated New Mexico law.

The State Engineer has the authority to deny underground water permits without a hearing, NMSA 1978, § 72-12-3(F) (2001), a section in the groundwater permitting statutes which the State Engineer cites, albeit incorrectly, in his Order Denying Application, ¶ 6. Applicant argues that once the OSE accepted the application and published notice, the State Engineer could not reject the application without a hearing. Applicant's Response in Opposition to Motion for Summary Judgment, at 14-15. Section 72-12-3(C) provides that no application can be accepted by the State Engineer unless all of the information required by Subsection A accompanies the application. The OSE staff did determine that the form had been completed with all the information required, but it was within the State Engineer's authority, pursuant to Section 72-12-3(F), to deny the application without a hearing. The duties from the two subsections differ. The first

under Subsection C is an administrative task by OSE staffers to make sure an application is complete before proceeding to publication and submission to a hearing examiner for review. The hearing examiner then analyzes the substance of an application in light of New Mexico water law and the issues raised by protestants, if any.

If the acceptance by the OSE under Subsection C requires the hearing examiner under Subsection F to hold an evidentiary hearing, the statutory language in Subsection F allowing him to deny an application without a hearing would be negated. "[W]e must interpret the statute according to common sense and reason, Sandoval v. Rodriguez, 77 N.M. 160, 420 P.2d 308 (1966); give its words their usual and ordinary meaning unless a contrary intent is clearly indicated, State ex rel. Duran v. Anaya, 102 N.M. 609, 698 P.2d 882 (1985); give effect to every part of the statute, Weiland v. Vigil, 90 N.M. 148, 560 P.2d 939 (Ct. App.), cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977); and construe it as a harmonious whole. General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 703 P.2d 169 (1985)." *Varoz v. New Mexico Bd. of Podiatry,* 104 N.M. 454, 456, 722 P.2d 1176 (S. Ct. 1986).

Section 72-12-3(F) provides the statutory authority for the State Engineer to deny an application without a hearing, but the State Engineer also cites a surface water statute as his authority to deny an underground water application, NMSA 1978, § 72-5-7 (1985), which provides in pertinent part that the State Engineer "may also refuse to consider or approve any application or notice of intention to make application . . . if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state." Order Denying Application, ¶ 7; *see also* Order Denying Application, ¶ 24.

At oral argument on appeal, counsel for the State Engineer referred to *City of Albuquerque v. Reynolds,* 71 N.M. 428, 437, 379 P.2d 73, 79 (1962) as support for the State Engineer's policy of applying a statute found only in one part of the water code to both surface and groundwater issues. *City of Albuquerque v. Reynolds* does provide support for this policy for substantive issues once a water right is secured, but it does not provide support for confusing the procedural processes to obtain surface and groundwater permits. As quoted in *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 21, 143 N.M. 142, 173 P.3d 749, "There does not exist one body of substantive law relating to appropriation of stream water and another body of law relating to appropriation of underground water. The legislature has provided somewhat different administrative procedure [sic] whereby appropriators' rights may be secured from the two sources but the substantive rights, when obtained, are identical." City of Albuquerque v. Reynolds, 71 N.M. 428, 437, 379 P.2d 73, 79 (1962)." Accordingly, the surface water statute governing administrative procedures has no bearing on the State Engineer's decision to deny the underground water application in this case.

Section 72-12-3(F) does not explain under what circumstances the State Engineer may deny an application. The State Engineer is an administrative officer whose office is created by statute, NMSA 1978, § 72-2-1 (1982), and whose authority is thereby "limited to the power and authority that is expressly granted and necessarily implied by statute." *In re Application of PNM Elec. Servs.,* 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147. If the application is facially invalid, that is, that on its face the application violates New Mexico law, the State Engineer had no authority to act other than to reject the application.

B. The application violates the underground water permitting statute and contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

In reviewing the State Engineer's decision de novo, this Court has determined that the application had to be denied by the State Engineer for the following reasons: (1) the application fails to specify the beneficial purpose and the place of use of water, contrary to NMSA 1978, § 72-12-3(A)(2),(6) (2001); and (2) the application contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

In this de novo review, this Court will not examine the argument of Protestants (Memorandum in Support of Protestants' Motion for Summary Judgment, at 12-13) that the application violated statutory notice provisions, because that is a secondary issue that would only be addressed if the application passed the threshold issue of facial validity. See *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, 147 N.M. 523, 229 P.3d. 622.

In *Lion's Gate,* the Supreme Court held that the State Engineer was barred from considering secondary issues such as impairment and conservation of water if as a threshold issue he determined that there was no water available to appropriate. *Id.,* 2009-NMSC-057, ¶ 27 ("If the State Engineer makes a pre-hearing determination that water is unavailable for appropriation, secondary issues that must otherwise be considered before a permit to appropriate water can be granted become irrelevant, because the State Engineer is required to reject the application without reaching those issues.")

Likewise in this de novo appeal, the State Engineer's decision was based on the application itself rather than the secondary issue of potential protestants' rights to notice. Under Section 72-12-3(F), the State Engineer can deny an application regardless

of protests if he determines, as he did here, that the threshold issue of validity vis-à-vis New Mexico water law requires him to reject an application on its face.

1. The application fails to specify the beneficial purpose and the place of use of water, contrary to NMSA 1978, § 72-12-3(A)(2),(6) (2001).

The statutory provision outlining the requirements for an underground water permit application is NMSA 1978, § 72-12-3 (2001). Subsection (A)(2) requires an applicant to designate "the beneficial use to which the water will be applied." Applicant listed eleven uses in its amended application. Subsection (A)(6) requires an applicant to designate "the place of the use for which the water is desired." For its proposed places of use Applicant identified 37 quarter sections on its ranch and "[a]ny areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico." Amended Application, Attachment B.

The State Engineer determined that the eleven proposed uses, in conjunction with the broad descriptions for place of use, were not sufficiently specific to allow the State Engineer to determine whether the application should be granted, because it was unclear where the water would be used and for what purpose. The State Engineer could not fulfill his statutory duty to evaluate "whether the proposed appropriation would impair existing rights or would not be contrary to the conservation of water in the state or would not be detrimental to the public welfare of the state." Order Denying Application, ¶ 8.

On appeal, Applicant argues that nothing in the regulations or statutes prohibits an applicant from identifying multiple beneficial uses. Applicant's Response in Opposition to Protestants' Motion for Summary Judgment, at 10-11. Applicant also argues that the seven counties and the watershed boundaries of the Rio Grande are definite enough to

provide "sufficient information to allow interested parties to identify the legal subdivision where the water will be put to use." Applicant's Response in Opposition to Protestants' Motion for Summary Judgment, at 12-13. Throughout its Response to Protestants' Motion for Summary Judgment, Applicant argues that the application should be treated as a court complaint and be given the benefit of the doubt as to specificity until the case is heard on its evidentiary merits.

Unlike civil complaints brought under the original jurisdiction of a district court, this matter arises from a statutory permitting procedure before the State Engineer, requiring analysis of the statute governing the granting of an underground water permit. There is a dispute as to whether the statute requires specificity, and if so, whether the amended application meets the statutory specificity requirement. It is not clear, however, from a plain reading of Sections 72-12-3(A)(2) and (6) what the Legislature intended in regard to the level of specificity mandated. Therefore, the Court "must resort to construction and interpretation to ascertain legislative intent." *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 485, 650 P.2d 3 (Ct. App. 1982).

As stated in *State v. Nick R.*, 2009-NMSC-050, ¶ 16, 147 N.M. 182, 218 P.3d 868, "The first step in any statutory construction is to try 'to determine and give effect to the Legislature's intent' by analyzing the language of the statute," quoting *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n,* 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.2d 3.

The language of Sections 72-12-3(A)(2) and (6) employ a singular noun for an application's required beneficial "use" and "place" of use. The singular does not mean, however, that the statute requires an applicant to seek only one use in only one place per

application. There is a rule of statutory construction that states, "Use of the singular number includes the plural, and use of the plural number includes the singular." NMSA 1978, § 12-2A-5(A) (1997), cited by *State v. McClendon,* 2001-NMSC-023, ¶ 16, 130 N.M. 551, 28 P.3d 1092.

Just because the underground water permitting statute may allow for designation of multiple uses and places of use does not mean that all or nearly all possible uses and huge areas of land for places of use can be stated in an application without being rejected for vagueness. There is no question that if no beneficial use or place of use was selected, then the application would have to be denied. In fact, it would have been rejected earlier by OSE staff pursuant to Section 72-12-3(C) as being incomplete. On the other end of the spectrum is when all of the choices for place of use are checked off and even more are added. By choosing all of the named options and including several more, there was no narrowing down or selection of use in the application itself, there was just an "all of the above" approach. As for place of use, designating "any" area within the seven-county Middle Rio Grande watershed opened up great uncertainty as to where Applicant's pipeline would go and where it would be actually used, because the word "any" is a general term rather than specific.

Under Applicant's view of the permit process, identifying the actual, specific use and actual, definite place of use would not be required until later in the process, which Applicant intimates would be developed through an evidentiary hearing, a hearing the State Engineer denied. If, however, an underground water permit application requires specificity, then the amended application failed to specify, that is, that it failed to particularize, Applicant's plans for actual beneficial use of water and the actual place of

use for the water, thereby making it impossible for the State Engineer to perform his statutory duty of determining whether to grant the application and issue a permit. *See Tri-State Generation & Transmission Ass'n v. D'Antonio,* 2011-NMCA-015, ¶¶ 12-13, 149 N.M. 394, 249 P.3d 932, *reversed on other grounds, Tri-State Generation & Transmission Ass'n v. D'Antonio,* No. 32,704, slip op. (N.M. S. Ct. Nov. 1, 2012) ("The . . . permitting . . . statutes . . . require the State Engineer to evaluate factors such as beneficial use, availability of unappropriated water, and impairment of existing rights. In order to evaluate beneficial use, the State Engineer must assess the quantity, place of use, and purpose to which water has actually been applied. See State ex rel. Martinez v. McDermett, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct. App. 1995).")

Other subsections of the statute can be read *in pari materia* with Subsection (A)(2) to determine whether "beneficial use" and "place of use" must be stated with specificity. *See State v. Gurule,* 2011-NMCA-042, ¶ 12, 149 N.M. 599, 252 P.3d 823 ("[A]s a rule of statutory construction, we read all provisions of a statute and all statutes in pari materia together in order to ascertain the legislative intent. Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992).")

That the underground water permitting statute calls for specificity of beneficial use and place of use is supported by Subsection (A)(1), which requires applicants to designate "the **particular** underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated." NMSA 1978, § 72-12-3(A)(1) (2001) (emphasis added). Further, in Subsection D, in order to have standing, objectors to an application must prove that they "**will be** substantially and **specifically** affected by the granting of the application." NMSA 1978, § 72-12-3(D) (2001) (emphasis added). It would be

anomalous for an applicant to be allowed to give general statements of intent to appropriate water for beneficial use yet require specificity for objectors. That over 900 protests were filed in this case demonstrates the absurdity of this result, if Applicant's interpretation of the statute were allowed to stand. "We do not construe a statute in a manner that is contrary to the intent of the legislature or in a manner that would lead to absurd or unreasonable results. State v. Padilla, 1997-NMSC-22, P6, 123 N.M. 216, 937 P.2d 492; State v. Shafer, 102 N.M. 629, 637, 698 P.2d 902, 910 (stating that statutes must be construed according to the purpose for which they were enacted and not in a manner which leads to absurd or unreasonable results)." *State v. Romero*, 2002-NMCA-106, ¶ 8, 132 N.M. 745, 55 P.3d 441.

New Mexico courts have long considered specificity to be a statutory requirement for an underground water permit. *Hanson v. Turney, supra* ("A water permit is . . . 'the necessary first step' in obtaining a water right. . . to one day apply the state's water in a **particular place** and to a **specific beneficial use**.") (citations omitted); *Mathers v. Texaco, Inc.*, 77 N.M. 239, 248, 421 P.2d 771 (S. Ct. 1977) ("Here the applicant, Texaco, has **expressly specified the particular use** for which the water **is** to be appropriated and the **precise lands** to which the same **is** to be applied to accomplish the purpose of such use.") (emphasis added); *Cartwright v. Public Serv. Co.*, 66 N.M. 64, 110, 343 P.2d 654 (1959) (Federici, D.J., dissenting) ("The appropriator acquires only the right to take from the stream a given quantity of water for a **specified purpose**, Snow v. Abalos, 18 N.M. 681, 140 P. 1044, supra. Many times this Court has held that the priority of right is based upon the intent to take a **specified amount** of water for a **specified purpose** and he can

only acquire a perfected right to so much water as he applied to beneficial use.") (emphasis added)

Because Applicant failed to specify beneficial uses and places of use in its application and chose to make general statements covering nearly all possible beneficial uses and large swaths of New Mexico for its possible places of use, the State Engineer had no choice but to reject the application. The application does not reveal a present intent to appropriate water, but merely to divert it and explore specific appropriations later. See *State ex rel. Reynolds v. Miranda,* 83 N.M. 443, 493 P.2d 409 (S. Ct. 1972), citing *Harkey v. Smith*, 31 N.M. 521, 247 P. 550 (1926), for the proposition that the intent, diversion and use of water must coincide for an effective appropriation.

The lack of specificity for beneficial use and place of use is also demonstrated by analysis of another portion of the application and the State Engineer's denial. The State Engineer denied the application based in part on his determination that applying 12.16 afy "to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy." Order Denying Application, ¶ 11. Although the State Engineer stated that the usual CIR approved by the OSE is 3 afy, he did not state that no other applications that exceed that amount had been approved by the OSE. There is not enough information in the Order Denying Application for this Court to state with certainty that the amount applied to irrigation by Applicant would actually be 12.16 afy and that that amount would be, as a matter of law, excessive.

The State Engineer's difficulty in analyzing the application stems from the application's inherent ambiguity. The application is uncertain as to what amounts, if any, would be used for irrigation on Applicant's ranch because the application states its

purpose is to provide a pipeline for new and existing uses on the Rio Grande. That statement in Paragraph 7 of the application about a pipeline contradicts the modification to the amended application, which suggests that the 37 wells might provide irrigation to their respective 37 quarter sections, to the extent there would be any irrigation on the ranch resulting from the grant of a water permit. Because of the confusion between the application's stated pipeline purpose and the uncertain amounts to be used for irrigation on the ranch, the current application is invalid for lack of clarity.

The dismissal without prejudice allows Applicant to submit an application that meets the statutory requirement of specificity for beneficial use and place of use. But the application under review just outlines general potential uses and places of use; it does not describe what actually *is* to be the purpose and place of use. Rather than being the "first step" in obtaining a water right, the application demonstrates that Applicant is merely contemplating possible steps, like a player holding onto a chess piece before committing to a particular move. Under Applicant's theory, the statutory permit process is "inherently flexible," allowing a water user to make broad statements of use and place of use and lay claim to whatever amount of water a basin can bear, and then during the permit process that broad claim can be narrowed down by the State Engineer through evidentiary hearings. *See* Applicant's Response in Opposition to Motion for Summary Judgment, at 28.

Contrary to Applicant's theory, the history and purpose of the underground water permitting statute, NMSA 1978, § 72-12-3 (2001), underscore the requirement of an actual, specific plan to be outlined in an application. When interpreting statutes, "we seek to give effect to the Legislature's intent, and in determining intent we look to the

language used and consider the statute's history and background." *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, ¶ 23, 147 N.M. 523, 229 P.3d. 622 (citations omitted).

In *State ex rel. Reynolds v. Mendenhall,* 68 N.M. 467, 362 P.2d 988 (1961), the Supreme Court, faced with the question of the priority date of a well, explored the history of groundwater statutes in light of the doctrine of relation. "Long in his Treatise on the Law of Irrigation (2d Ed.) 126, describes the doctrine in these words: 'The rights of an appropriator of water do not become absolute until the appropriation is completed by the actual application of the water to the use designed; but where he had pursued the work of appropriation with due diligence, and brought it to completion within a reasonable time, as against other appropriators, his rights will relate back to the time of the commencement of the work . . . ." *State ex rel. Reynolds v. Mendenhall,* 68 N.M. at 470.

Mendenhall traces New Mexico's application of the doctrine of relation for surface water from the territorial cases of *Keeney v. Carillo,* 2 N.M. 480 (1883) (doctrine applied to waters of a spring, stream or cienega) and *Millheiser v. Long*, 10 N.M. 99, 61 P. 111 (1900) (applying the doctrine in "holding that a valid appropriation was accomplished when, after an intention had been formed, notice of such intent given, and the works constructed, water was diverted and put to beneficial use within a reasonable time"). *State ex rel. Reynolds v. Mendenhall,* 68 N.M. at 471.

Among other precedents, *Mendenhall* cites *Farmers' Dev. Co. v. Rayado Land & Irrigation Co.,* 28 N.M. 357, 213 P. 202 (1923), a case examining the common law of appropriation, the first territorial permitting statutes of 1905 that permissively replaced procedures for obtaining a water right under the common law of appropriation, and the

1907 territorial water code that mandated that permits replace the former common law rules of appropriation in securing a water right.

Mendenhall cites all these cases because the Supreme Court faced a problem as to how to determine the priority date for underground waters without clear statutory authority. The underground water statutes enacted first in 1927 and again in 1931 did not explicitly mention the doctrine of relation, whereas the 1907 water code covering surface waters did. After declaring that all surface waters belong to the public and are subject to appropriation for beneficial use, NMSA 1978, § 72-1-1 (1907), the Legislature explicitly declared that the doctrine of relation applied to appropriated surface waters: "All claims to the use of water initiated thereafter [after March 19, 1907] shall relate back to the date of the receipt of an application therefor in the office of the territorial or state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder." NMSA 1978, § 72-1-2 (1907).

The Supreme Court in *Mendenhall* held that the doctrine of relation was implicitly the law for underground waters because the general law of appropriation applies equally to surface and ground water. *State ex rel. Reynolds v. Mendenhall,* 68 N.M. at 472, citing *Yeo v. Tweedy,* 34 N.M. 611, 286 P. 970 (1929) and *Pecos Valley Artesian Conservancy Dist. v. Peters,* 52 N.M. 148, 193 P.2d 418 (1948).

With a statutory permit, an appropriator, whether for surface or underground waters, has a clearly defined priority date, which is the date the application was received by the State Engineer, a great innovation in western water law in the late 19th and early 20th centuries. Samuel C. Wiel, in his landmark work, **Water Rights in the Western States**, described how permitting statutes grew out of the pre-existing laws and were

generally declaratory thereof, but the statutes provided an advantage over the older law by providing certainty as to which person had the priority of time and therefore priority of right. *See* N.M. Const. art. XVI, § 2, "Priority of appropriation shall give the better right."

A permitting statute would "fix the procedure whereby a certain definite time might be established as the date at which title should accrue by relation." Wiel, **Water Rights in the Western States**, §§ 368-69, pp. 398-99 (3d. ed. 1911). As Wiel noted in Section 368, both the old law and the new permitting statutes did not countenance anyone acting "the dog in the manger," a reference to Aesop's fable of a dog that blocks cattle from feeding, even though the dog itself has no appetite for hay. Wiel wrote, "Many attempted to secure monopoly of waters by merely posting notices or making a pretense at building canals, ditches, etc., and tried by this means to hold a right to the water against later comers who *bona fide* sought to construct the necessary works for its use." *Id.*, § 368. See also *Cartwright v. Public Serv. Co.*, 66 N.M. at 110 (Federici, D. J., dissenting), referencing state policy prohibiting "the dog in the manger" tactics, quoting with approval *Harkey v. Smith,* 31 N.M. 521, 531, 247 P. 550 (1926) ("[N]o dog in the manger' policy can be allowed in this state. [U]nless these waters can be and are beneficially used by plaintiffs, the defendants or others may use the same.")

If its application had been approved, Applicant would have had a priority date of October 12, 2007, the date of the original application's receipt by the OSE, after Applicant had applied the waters to beneficial use. In the meantime, however, while Applicant was deciding exactly how and where to apply the waters approved, Applicant would have had tentative priority over anyone else who after October 12, 2007 wanted to

use the same waters or waters hydrologically related thereto. For many years, Applicant would have been the dog in a very big manger, an entire underground water basin.

To place the size of Applicant's claim in perspective, this Court takes judicial notice of a New Mexico appellate decision describing the Pecos River settlement agreement among the Carlsbad Irrigation District, the State of New Mexico, the United States and other entities. This major settlement agreement, described in *State ex rel. Office of State Engineer v. Lewis,* 2007-NMCA-008, ¶¶ 44-45, 141 N.M. 1, 150 P.3d 375, "judicially establishes the maximum allowable annual diversion and storage rights of the United States and the CID, and the CID's right to deliver water for the members of the CID," in the amount of 50,000 afy. Applicant's claim over water, in the amount of 54,000 afy, is larger than the maximum water supply available for the Carlsbad Irrigation District's many users. This illustration from one watershed demonstrates the enormous potential available for Applicant to monopolize the waters that would have otherwise been available to other users wishing to apply the underground waters of the San Agustin Basin to beneficial use.

In reviewing the application in light of the permitting statute's language, context, history and purpose, there is no genuine issue of material fact as to the application's invalidity regarding purpose and place of use. As admitted by Applicant, "[h]ow and whether Augustin will be able to put water to beneficial use is an issue that cannot be determined from the Application alone." Applicant's Response in Opposition to Motion for Summary Judgment, at 25. With no details for all of the required elements of a water permit, the State Engineer could not perform his statutory duties under NMSA 1978, § 72-12-3(E) (2001) of determining whether the proposed appropriation would impair

existing rights, be contrary to the conservation of water, or be detrimental to the public welfare. As a matter of law, the State Engineer could not allow an applicant to hold up other uses of water under the doctrine of relation, when the applicant broadly claims a huge amount of water for any use and generalizes as its place of use "any area" in seven counties in the Middle Rio Grande Basin, covering many thousands of square miles.

2. The application contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

The State Engineer relied in part on "sound public policy" as grounds for summarily denying Applicant's permit application. Order Denying Application, ¶¶ 21-23. Applicant argues that "the State Engineer lacks authority to deny an application that otherwise meets the statutory requirements on the basis of public policy." Applicant's Response in Opposition to Motion for Summary Judgment, at 17-18. A sound public policy at the heart of this case is the prior appropriation doctrine. *See Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 17 ("New Mexico follows the doctrine of prior appropriation.") *See also, Walker v. United States*, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (discussing distinctions between the prior appropriation doctrine of the arid West and the riparian rights doctrine found primarily in the wetter East).

At the founding of this state, the people of New Mexico elevated the prior appropriation doctrine to constitutional status. N.M. Const. art. XVI, §§ 2, 3. Two fundamental elements of the prior appropriation doctrine are that the waters in the State of New Mexico belong to the public and that beneficial use is the basis, the measure and the limit of the right to the use of water. *Id.* Both of these elements of the prior appropriation doctrine are undermined if Applicant's theory of securing water rights is allowed to stand.

Beneficial use is the basis, the foundation, for the establishment of rights to the use of water in New Mexico, "a fundamental principle in prior appropriation." *State ex rel. Martinez v. City of Las Vegas,* 2004-NMSC-009, ¶ 33, 135 N.M. 375, 89 P.3d 47. In reaffirming the principle of beneficial use that had been undercut by the expansion of the pueblo rights doctrine in *Cartwright v. Public Serv. Co.*, 66 N.M. 64, 343 P.2d 654 (1959), the Supreme Court in 2004 reiterated that "[t]he principle of beneficial use is based on 'imperative necessity,' Hagerman Irrigation Co. v. McMurry, 16 N.M. 172, 181, 113 P. 823, 825 (1911), and '**aims fundamentally at definiteness and certainty**.' Crider, 78 N.M. at 315, 431 P.2d at 48 (quotation marks and quoted authority omitted)." (emphasis added) Thus, not only does the underground water permitting statute require specificity, the constitutional mandate of beneficial use as the basis of a water right requires specificity of the actual place and use of water, along with all the other definite elements required to create a water right.

Applicant's plan for the use of 54,000 afy reveals no definiteness or certainty other than the purpose of the application being the creation of a pipeline served by 37 wells, with the actual uses to be figured out later. Under this plan, diversion would supplant beneficial use as the fundamental principle of water use in New Mexico. One would only have to apply for a permit to divert a given quantity of water, no matter how large, and that person would then have a prior claim to the water over anyone else who actually had a specific plan for the water's beneficial use.

Over a century ago, that plan was attempted when some irrigators diverted the entire flow of the Hondo River but failed to apply it to beneficial use before other irrigators had beneficially used the waters in the stream. The Territorial Supreme Court

in *Millheiser v. Long*, 10 N.M. 99, 104, 61 P. 111, 114 (1900) reversed a district court's determination of the parties' rights "according to priority of diversion, rather than priority of appropriation to a beneficial use." "Diversion," the Supreme Court noted, "is still but an element of that appropriation, and not equivalent to it." *Id.* From that day to the present, it has been the law in New Mexico that diversion alone is not beneficial use. See *State of New Mexico ex rel. Turney v. United States of America et al. and Baca* (Subfile Defendant), No. 30,824, slip. op. at 15-16 (N.M. Ct. App. October 24, 2012), citing *State ex rel. Martinez v. McDermett*, 120 N.M. 327, 331, 901 P.2d 745, 749 (Ct. App. 1995) for the proposition that "diversion alone is not beneficial use."

Applicant seeks to become the purveyor of water via pipeline to users along the Rio Grande. Admittedly, there is stress on the existing uses of water in New Mexico, and if diversion alone were the requirement for establishing priority of the use of water, Applicant's plan as stated in his amended application might suffice: "The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply in the Rio Grande Basin in New Mexico." Beneficial use, however, is still the basis for a water right, not diversion. Therefore, the application is invalid as a matter of law.

Even if there was such a radical shift from beneficial use to diversion as the basis for a water right, a proposition, like the pueblo rights doctrine, "as antithetical to the doctrine of prior appropriation as day is to night," *Cartwright*, 66 N.M. at 110, 343 P.2d at 686 (Federici, D.J., dissenting), quoted in *State v. City of Las Vegas,* 2004-NMSC-009, ¶ 38, a major pipeline project such as envisioned by Applicant to "reduce the current

stress on the water supply in the Rio Grande Basin" would effectively transfer the ownership of much of the waters in the San Agustin Basin to a private entity. Via its pipeline, Applicant would be the middleman conveying a large amount of the state's waters to beneficial users, and perhaps to the state itself for Rio Grande compact deliveries, if those uses were first approved by Applicant and then ratified by the OSE.

But the public, not private entrepreneurs, own the water of this state. There is ample appellate authority emphasizing the public's ownership of New Mexico's waters. As quoted in the *Cartwright* dissent, "This Court said as late as 1947, in the case of State ex rel. State Game Commission v. Red River Valley Company, 51 N.M. 207, 224, 182 P.2d 421, 432: '. . . It is all yet public water until it is beneficially applied to the purposes for which its presence affords a potential use.'" *Cartwright*, 66 N.M. at 110. *See also The Albuquerque Land and Irrigation Co. v. Gutierrez,* 10 N.M. 177, 61 P. 357 (1900) (rejecting the riparian doctrine and holding that there is no private ownership of public streams in New Mexico); *Tri-State Generation & Transmission Ass'n v. D'Antonio,* No. 32,704, slip op. at 12 (N.M. S. Ct. Nov. 1, 2012) ("[W]ater belongs to the state which authorizes its use. The use may be acquired but there is no ownership in the corpus of the water. . . . **The state as owner of water has the right to prescribe how it may be used** . . . . The public waters of this state are owned by the state as trustee for the people.") (citations omitted) (emphasis added)

Under its diversion plan for the 37 wells on its ranch, Applicant, rather than the state initially, would have the right to prescribe which entities and projects would be allocated a share in the 54,000 afy that could be pumped from the underground basin, with the final approval, of course, by the State Engineer, over the years as those projects

were conceived and given detail. The plan, if the application had been approved, would have removed the unappropriated waters in the San Agustin Basin from their character as public water, as described in *Red River Valley, supra,* prior to its being "beneficially applied;" the underground waters' potential use would be enough to create Applicant's claim of prior rights by a proposal for diversion alone, leaving the details of actual use for the future and under the direction of Applicant, who would thereby be a co-approver with the State Engineer for determining the beneficial uses for the underground waters.

This plan is reminiscent of that of Nathan Boyd at the turn of the last century for a dam and diversion of practically all of the waters in the Rio Grande flowing through the Mesilla and El Paso Valleys to be then sold to the local irrigators, a plan that was ultimately frustrated on technical grounds by the New Mexico territorial courts and the U.S. Supreme Court. *See United States v. Rio Grande Dam & Irrigation Co.,* 13 N.M. 386, 85 P.393 (1906), *affirmed by Rio Grande Dam & Irrigation Co. v. United States,* 215 U.S. 266, 54 L. Ed. 190, 30 S. Ct. 97 (1909); *see generally,* Phillips, Hall & Black, **Reining in the Rio Grande**, pp. 88-92 (2011).

In its Sur-Reply, Applicant likens its application to that of the Interstate Stream Commission (ISC) for a change of use/place of use for the waters of the Ute Reservoir, also known as Ute Lake, which application is attached as Exhibit A to Applicant's Sur-Reply. Both applications seek to transport a large quantity of water through pipelines and both claim all possible uses of water for their ultimate users, but that is where the comparison ends.

The ISC, a state entity created by statute in 1935, is governed by Chapter 72, Article 14 of the New Mexico Code Annotated. Among its duties are the duties "to

develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise." NMSA 1978, § 72-14-3 (1935). The ISC is also empowered to sell, lease and otherwise dispose of its waters from its water projects. *See* NMSA 1978, § 72-14-26 (1955). In 1950, the ISC became the state representative of the Canadian River Compact with the states of Texas and Oklahoma. In 1951, the New Mexico Legislature ratified the Canadian River Compact, opening the way for the ISC to impound the waters of the Canadian River below the Conchas Dam for conservation storage in Ute Reservoir of up to 200,000 acre-feet for subsequent release for multiple beneficial uses to satisfy future needs of the people of New Mexico. *See* NMSA 1978, § 72-15-2 (1951); *Oklahoma v. New Mexico*, 501 U.S. 221, 111 S. Ct. 2281, 115 L. Ed. 2d 207 (1991).

After many decades of preparation and obtaining funding, the ISC's Ute pipeline project is nearing completion, as evidenced by its application for change of use/place of use granted in 2010. In the meantime, Ute Reservoir has served a beneficial use, among others, as a state park owned by the ISC: "The New Mexico interstate stream commission owns this lake. . . ." 18.17.3.21(P) NMAC.

Without ruling on the validity of the ISC's application, which is not an issue before this Court, it is clear that Applicant is not the owner of the waters deep below its ranch in the San Agustin Basin and that Applicant has not already applied its waters to beneficial use as the ISC has, yet Applicant seeks to obtain incidents of ownership over the underground water basin by deciding who can use the waters and at what cost. Applicant attempts to privatize the powers of the ISC without any of the responsibilities of this public entity serving the owner of this state's waters, the New Mexico public.

If Applicant's plan for a major diversion project were approved, the people of New Mexico would thereby receive a benefit, according to Applicant, of a steady water supply that could accommodate many existing and new uses along the Rio Grande at a time when there is growing stress on this precious resource. But Applicant's offer would come at a heavy price, that price being the relinquishment of the public's constitutionally guaranteed ownership of the state's waters. Under de novo review, this Court finds that, as a matter of law, the application violates the sound policy of public ownership in the waters of this state as declared in the New Mexico Constitution.

V. CONCLUSION

There are no genuine issues of material fact, and Protestants are entitled to judgment as a matter of law. The State Engineer's Order Denying Application is affirmed. Counsel for the State Engineer shall prepare the order reflecting this decision.

Matthew Reynolds, District Judge, Div. II